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No. 985

In the Supreme Court of the United States

OCTOBER TERM, 1967

NATIONAL DAIRY PRODUCTS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 935

NATIONAL DAIRY PRODUCTS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. A–1)[1] is reported at 384 F. 2d 457. The opinion of the district court denying petitioner's motion for a new trial (Pet. A–15), following the remand by this Court (384 U.S. 883), is reported at 262 F. Supp. 447. The prior district court opinion is reported at 231 F. Supp. 663 (Pet. A–119) and the prior decision of the court of appeals is reported at 350 F. 2d 321 (Pet. A–83).

JURISDICTION

The judgment of the the court of appeals (Pet. A–1) was entered on October 27, 1967. A timely

[1] "Pet." refers to the petition, and "Pet. A" refers to the appendix thereto.

petition for rehearing was denied on November 21, 1967 (Pet. A–14). The petition for a writ of certiorari was filed December 21, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly ruled that the district court's failure to order disclosure to petitioner of grand jury testimony used to refresh the recollection of witnesses testifying primarily on certain counts did not prejudicially affect petitioner's conviction on other counts not related to the subject matter of the testimony.

2. Whether petitioner waived any right to inspect grand jury testimony of other witnesses by failing to make timely demand for such disclosure.

3. Whether the district court correctly instructed the jury concerning the application of Section 3 of the Robinson-Patman Act to sales below cost made for the purpose of destroying competition.

STATUTES AND RULE INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, Section 3, of the Robinson-Patman Act, 49 Stat. 1528, 15 U.S.C. 13a, and Rule 6(e) of the Federal Rules of Criminal Procedure are set forth in the appendix to the petition.

STATEMENT

On September 16, 1959 a federal grand jury indicted petitioner, National Dairy Products Corporation ("National") on fifteen counts and a vice president of National, Raymond J. Wise, on three counts,

for violations of Section 1 of the Sherman and Section 3 of the Robinson-Patman Acts.[2] The trial which commenced June 13, 1963, lasted more than two months; ninety-seven witnesses testified and more than 600 exhibits were introduced. The jury found National guilty on thirteen of the fifteen counts and Wise guilty on all three counts. National and Wise were fined and Wise received suspended jail sentences. The district court denied motions for a new trial (Pet. A–119), and the court of appeals affirmed the conviction of National on all counts (Wise having dismissed his appeal). 350 F. 2d 321 (Pet. A–83). In *National Dairy Products Corporation* v. *United States*, 384 U.S. 883 (Pet. A–81), this Court vacated the Eighth Circuit's judgment and remanded to the district court for further consideration in the light of *Dennis* v. *United States*, 384 U.S. 855.

Upon remand, the trial court denied petitioner's motion for a new trial, 262 F. Supp. 447 (Pet. A–15). The court of appeals ordered a new trial as to three

[2] The district court initially dismissed the indictment against Wise on the ground that a corporate officer charged with violating the Sherman Act in a representative capacity may be prosecuted only under Section 14 of the Clayton Act, but not under the Sherman Act. On direct appeal by the United States, this Court reversed. *United States* v. *Wise*, 370 U.S. 405. The district court also dismissed the Robinson-Patman Act counts, on the ground that Section 3 of that Act, which makes it a crime to sell "at unreasonably low prices for the purpose of destroying competition * * *," was unconstitutionally vague. This Court reversed, holding that the statute was not unconstitutionally vague as applied to the indictment in this case, which charged that the unreasonably low prices were below cost. *United States* v. *National Dairy Products Corp.*, 372 U.S. 29.

counts but affirmed the conviction on the other ten counts. 384 F. 2d 457 (Pet. A–1).

1. THE EVIDENCE

National is a large nationwide producer of dairy products. It operates a dairy plant in Kansas City, Missouri, which produces, among other products, milk sold in paper cartons. From Kansas City it distributes such milk for sale in the greater Kansas City area and in rural communities in Missouri and Kansas. The Sherman Act and Robinson-Patman Act violations, of which petitioner was convicted, were committed in the greater Kansas City area and in 5 rural markets. There was a Sherman Act and a Robinson-Patman Act charge covering each rural market; and two Sherman Act charges (involving different periods; counts 11 and 12) and one Robinson-Patman charge (count 13) covering the greater Kansas City market. The evidence showed that National conspired with its competitors in the Kansas City market, and with its independent distributors who resold its milk in the rural markets, to fix prices, and that it sold milk below cost for the purpose of driving other dairies out of business or compelling them to follow National's pricing policies. The primary targets of National's actions were small dairymen who sold low-priced milk in glass gallon jugs.

National conceded that during the relevant period it sold milk in the five rural markets below its own cost. (Petition for certiorari, No. 758, Oct. Term 1965, p. 7). National obtained from its independent distributors in those markets an agreement to follow

resale prices set by National in return for a guarantee that they would have a stated gross profit margin no matter how low the prices might be set (Tr. 2913, 2918–2921, 3325–3332, 3872–3875, 3938, 4058–4060, 4093–4094, 4207, 4215–4217). Typically, National's price reductions followed threats to its local competitors that such reductions would occur unless gallon jug prices were raised (Tr. 3338, 3396, 3988–3989, 4057–4062, 3071, 4227, 4229–4232). The purpose of the reductions was to eliminate the competition of the gallon jug operators (Tr. 3042, 3046, 4400–4404, 4138–4139, 4121–4123, 4091–4092, 3073, 4254–4256, 4342, 4311). By lowering these resale prices, National could control the price spread between paper half-gallons of its Sealtest brand and cartons or glass gallon jugs sold by local competitors. And by keeping its local prices at a low level for a period, even though it operated at a temporary loss in those markets, National was able to attract most of its competitors' customers. The small operators with which it competed could not withstand such pressures. Several small family dairies and jug dealers were forced out of business (Tr. 4179–4181, 3103, 3164, 4227–4233, 4257–4268), while others were forced either to stop handling jugs (Tr. 4057–4067) or to comply with National's directions as to the price differential which should exist between jugs and paper cartons (Tr. 3361, 3404, 3408, 3528, 4307–4312).

In the Greater Kansas City market, National conspired to fix prices during two different periods—September–October 1957 and June–October 1958. The first conspiracy involved National and three other dairies—Borden Company, Fairmont Foods Company,

and Foremost Dairies, Inc. The targets of the conspiracy were the glass jug operators and Hawthorn Mellody Dairy, which had been offering milk to Milgrim Food Stores at a 13 percent discount. (Tr. 341, 6131).

The conspiracy was carried out through a series of phone calls and meetings in Kansas City and in National's Chicago office (*e.g.,* Tr. 1009–1016, 418–419, 457–462; 6300, 1618, 674; 1620, 1623; 688–670; 242–245; 1623–1627, GX 167–A), as a result of which the price for a half-gallon of milk in cartons sold by the conspiring dairies moved in less than a month from 37 cents down to 33 cents, then up to 41 cents and back down to 39 cents (GX 101, 104, 104A; Tr. 1804). During this price maneuvering, the gallon jug operators were warned that the spread between jug and carton would have to be narrowed to no more than a 5 cent differential (Tr. 707, 2365–2367, 668–672, 1044–1046, 1669–1670, 2364–2365).

By the spring of 1958, the Kansas City milk market was again highly competitive. National proposed a plan under which prices would be lowered until the competition was weakened, and then raised. Between June and October 1958, there was an elaborate series of meetings, phone conversations and communications involving National, Borden, Fairmont, Foremost and occasionally Hawthorn Mellody. (*E.g.,* Tr. 922–923; 273, 278–280, 925–926; 928–930; 1070–1072; 541, 6413, 6417; 938–939, 874–875, 1266; 1614–1616; 295–296, 1278; 1645–1646, 880, 2470–2471, 1553; 6434–6435, 879;

654, 882, 6435–6436; 883–884, 948–951, 1104–1105, 1777–1780; 949–951, 1104–1109.) National's object was to obtain a "sound" market, which it defined as one from which gallon jugs, spot pricing, two-for-one sales, and the Milgrim discount had been eliminated (Tr. 270–278).

On July 14, 1958, all major dairies but one (which was not a member of the conspiracy) reduced milk prices (GX 103) and a week later they dropped by-product prices (Tr. 6434–6435, GX 108). On August 1, Borden, Fairmont, Foremost and Hawthorn Mellody adopted a discount schedule proposed by National which eliminated the Milgrim stores discount (GX 109). These price cuts forced the jug operators to follow the dairies' instructions concerning the price at which milk should be sold (Tr. 2098–2100, 2244, 2252–2253, 2369). On August 27, 1958, the dairies simultaneously raised their prices; they did so again in October (GX 103, 108).

2. THE GRAND JURY TRANSCRIPT

During trial the government requested leave of the court to refresh the recollection of certain witnesses about matters relating to the Kansas City conspiracy (counts 11, 12 and 13) by reading to them portions of their grand jury testimony. Petitioner moved for disclosure of the portions of the grand jury transcript which the government proposed to use and also the

related portions (Tr. 447; Pet. A–168, A–193–194, A–211–212, A–218). The motion was denied. Thereafter, under close supervision by the court, the transcript was used in attempts to refresh the recollection of seven witnesses, all of them officers or employees of the dairy companies involved (Pet. A–156–157).[3] The court repeatedly instructed the jury that only the witness' present recollection was to be considered as evidence (*e.g.*, Tr. 449–452; 1278–1279; 6368–6369).

On appeal from its conviction, petitioner raised a broad range of issues, including the contention that the district court had abused its discretion in denying the defendants' motion to inspect the portions of the grand jury transcript used in attempts to refresh the recollection of the seven witnesses (Pet. A–99 to A–104). The court of appeals rejected this argument (Pet. A–99 to A–104) and affirmed the conviction. Petitioner then sought certiorari and this Court granted the petition, vacated the judgment of the court of appeals and remanded the case to the district court "for further consideration in the light of *Dennis* v. *United States*," 384 U.S. 855, which was decided the same day as the order in this case was entered.

Following remand, petitioner moved in the district court for a new trial, renewing its argument that the court erred in denying its motion to inspect the grand

[3] See Tr. 453–456; 475–476; 498–503; 505–508; 515–521; 534–538; 637–640; 641–644; 825–829; 1006–1008; 1012–1014; 1018–1021; 1033–1035; 1073–1078; 1082–1083; 1097–1100; 1238–1240; 1248–1252; 1276–1279; 5523–5524; 6353–6363; 6365–6371; 6415–6417.

jury testimony used in the attempts to refresh the witnesses' recollections (Pet. A–16), and urging for the first time that it had a right to inspect testimony of other witnesses, some thirty in number, despite the fact that it had never sought such inspection during the trial. (Pet. A–16–17). After extensive briefing and argument, the district court denied petitioner's motion and once more entered judgments of conviction on all 13 counts. (Pet. A–65, 70).

On appeal, the court of appeals set aside petitioner's conviction on the three counts to which the testimony of the witnesses, whose memory the government attempted to refresh, primarily related, but affirmed the judgment as to the other counts (Pet. A–2).

The court also rejected petitioner's claim that it was entitled to a new trial for failure to receive access to grand jury testimony of other witnesses, because petitioner had not made a timely motion at the trial to preserve its claim of error (Pet. A–11) and had failed to demonstrate plain error affecting its substantial rights (Pet. A–12).

ARGUMENT

1. The court of appeals properly held that the failure to order disclosure of grand jury transcripts of the witnesses, whose testimony related almost exclusively to counts 11, 12 and 13,[4] did not require

[4] Only one of the witnesses whose grand jury testimony was used in an attempt to refresh his recollection, Baird, testified about both the rural areas and Kansas City. On cross-examination, government counsel attempted to refresh his recollection by reading a portion of his grand jury testimony, but was unable to do so (Tr. 5523–5524).

Petitioner erroneously contends that defense witness Stewart

reversal of petitioner's conviction under counts 1 through 10. The court held that the prosecution's use of grand jury testimony during trial in and of itself established particularized need for inspection by the defense; it thus adopted a rule wholly consistent with *Dennis* v. *United States,* which will apply prospectively in all prosecutions in the Eighth Circuit. The court also recognized that *Dennis* stands for the proposition that particularized need may exist even when the transcript is not used at trial (Pet. A–6) but concluded that whether particularized need has been shown in such circumstances depends on the facts of each case. Thus this case raises no issue concerning interpretation of this Court's *Dennis* decision. Moreover, since the district court's denial of the request for the grand jury minutes occurred prior to this Court's decision in *Dennis,* there is little reason to expect that the question presented here will have substantial impact on future cases.

Petitioner argues that because intent to eliminate competition was an element in all counts, and because the court instructed the jury that it might consider evidence pertaining to another Sherman Act count if

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testified as to the rural markets (where other witnesses testified to dealings with him). (Pet., pp. 8, 18.) Petitioner's counsel limited his questioning of Stewart to the Greater Kansas City counts and cross-examination was similarly so limited (Tr. 6076–6442). When outlining the evidence to the jury, the trial court stated that the lack of testimony by Stewart with respect to a rural count did not preclude the jury from considering testimony of other witnesses concerning conversations with Stewart (Tr. 7186). The efforts to refresh Stewart's recollection were concerned with the Kansas City counts; such efforts failed (Pet. A–266—A–279).

it found that such evidence bore on intent in the count under consideration (Pet. A–17–18), the error of nondisclosure necessarily affected the distributor counts. The record does not support this argument. The fact is that none of the instances where a witness' recollection was successfully refreshed involved testimony concerning National's intent to eliminate competition.[5] Thus, the instances where a witness' recollection was refreshed could not have had a "substantial impact" (Pet. 18) on the intent issue with respect to counts 1 through 10.[6] Indeed, as the court of appeals pointed out (Pet. A–9, n. 5), in its post-trial motions in which it challenged the failure to make the transcript available, National did not contend that such failure affected the latter counts.

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[5] Tr. 638–640; Tr. 825–829; 1006–1008; 1019–1021; 1033–1035; 1082–1083; 1099–1100; 1238–1240; 1275–1276. See pages 12–13, *infra*.

The only instance possibly touching upon intent was the testimony of Borden's plant manager, Augenstein, who in relating a conversation with Howard Adams of Adams Dairy, testified that he "speculated" as to the reasons for the price drop in Greater Kansas City on September 13, 1957 (Tr. 1032). After reading of the grand jury transcript, Augenstein recalled mentioning as one of the reasons the fact that National had been taking pictures of low-priced gallon jugs (Tr. 1035, Pet. A–233). This testimony was never brought to the jury's attention with respect to any distributor count.

[6] Contrary to petitioner's inference that the government argued before the jury that its theory of guilt in the distributor counts was the same in the Greater Kansas City counts (Pet., p. 17), government counsel made no such suggestion in closing argument. Nor did they suggest that any evidence of the seven witnesses upon whom refreshment was attempted be considered in deciding National's guilt under the distributor counts (Tr. 6773–6904, 7037–7056). There is no such suggestion in the

Moreover, even as it relates to the Kansas City events, the evidence that was adduced by refreshing the witnesses' recollections was so insignificant that it could not have prejudiced petitioner's conviction on the counts relating to the rural areas. As the court below observed:

> The record discloses that resort to the grand jury transcript produced only a minutia of substantial evidence. In most instances the witness either testified that he was not refreshed or attested to the veracity of his testimony before the grand jury. The record reveals, moreover, that such testimony was merely cumulative and that there was an abundance of other evidence, both verbal and documentary, to support the convictions under counts one through ten [Pet. A–10].

In only twenty-four instances was an attempt made to use the grand jury transcript to refresh a witness' recollection, and all were confined to the Greater Kansas City counts. In only three instances was the witness' recollection refreshed (Tr. 1019, 1034–35, 1083, Pet. A–228, A–233, A–243–244). In six other instances, the witness testified in substance that his recollection was not refreshed but "if that is what I told the grand jury, it must be true" (Tr. 638–39, 825–29, 1006–07, 1099–1100, 1238–39, 1276–77, Pet. A–198–

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court's outline of the evidence to the jury, which supplemented the closing arguments' (Tr. 7155–7196). The theory of each count and its related evidence were argued separately by counsel. In fact, at the opening of government counsel's argument, he urged the jury not to consider the entire indictment as a whole but to view as an entity "each conspiracy" charged (Tr. 6781).

199, A–213–214, A–220, A–247, A–253, A–261). Under the court's oft-repeated instructions (Tr. 450–51, 564, 1278–79, 7074–75, Pet. A–102, A–32–35), such testimony was not to be considered by the jury because the witness did not state affirmatively that his recollection was refreshed. In all other instances, the witness testified that his recollection was not refreshed and the matter was at an end.[7]

Under the facts of this case it is plain that the error of the trial court in not directing disclosure of the grand jury testimony did not affect counts 1 through 10. The court below was fully justified in invoking the harmless error rule. *Cargill* v. *United States,* 381 F. 2d 849 (C.A. 10), certiorari denied, January 15, 1968, No. 794, this Term. See *Campbell* v. *United States,* 373 U.S. 487; *Rosenberg* v. *United States,* 360 U.S. 367.[8]

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[7] Tr. 453–456; 473–476; 498–503; 505–508; 515–521; 534–537; 641–644; 1012–1013; 1073–1078; 1248–1252; 5523–5524; 6353–6361; 6363; 6364–6371; 6413–6417; Pet. A–170–171; A–174; A–178–179; A–182; A–185; A–193; A–201; A–223–224; A–239–242; A–256–257; A–264–265; A–270; A–271; A–275; A–279.

[8] Petitioner's argument that the refreshment procedure violated its Constitutional right to a fair trial, by placing before the jury non-record evidence and preventing confrontation and cross-examination, is without substance. It rests on an attempted analogy to *Robbins* v. *Small*, 371 F. 2d 793 (C.A. 1), a wholly inapposite case. In *Robbins*, the prosecutor, in the face of the plain and persistent claim by a key witness of his privilege against self-incrimination, asked him a series of fourteen leading questions, increasingly prejudicial to defendant, and drawn from the witness' extra-judicial statement, which was never placed in evidence. The court held that the prosecutor was in effect testifying and putting improper evidence before the jury, and that defendant's right of confrontation under the Sixth Amendment was thus violated. The court also observed

2. The court of appeals correctly held that petitioner's failure at the trial to seek inspection of the grand jury testimony of other government witnesses precluded it from raising the claim that the lack of such inspection required a new trial.

On remand, for the first time, petitioner sought a new trial on the ground that it had not been permitted to inspect the grand jury testimony of thirty government witnesses as to whom the government made no use of grand jury transcripts at trial (Pet. A. 16–17). Petitioner argues here (Pet. 21), as it did below (Pet. A–17), that it was entitled to inspect these transcripts because many of the witnesses were hostile and the government had the use of the testimony in preparing for trial. The court of appeals found it unnecessary to determine whether petitioner had established, under *Dennis,* a particularized need for inspection with respect to these witnesses; it properly held that petitioner had failed to preserve its claim of error for review or to establish plain error (Pet. A. 11–12).

Petitioner would excuse its failure to make a timely motion to inspect on the ground that under *United*

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that apart from this improper evidence, the evidence of defendant's guilt was not strong, and that the trial court's belated instruction was not effective to cure the prejudice.

In contrast, the district judge in the present case carefully supervised the use of the grand jury testimony to ensure that neither the witness nor petitioner was prejudiced. Government counsel recognized that if the witness' recollection was not refreshed, "that is the end of it" (Tr. 5521). The court carefully and repeatedly instructed the jury that the grand jury testimony was not evidence in the case (Tr. 449–452; 564; 829–830; 1278–1279; 6368–6369; 7074–7075). The court also monitored the tone and phrasing of counsel's questions to ensure that they raised no improper inferences (Tr. 642–643; 826–827; 1251–1252).

States v. *Procter & Gamble Co.*, 356 U.S. 677, and *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, it could not have shown particularized need at the time of the trial and that it was not until *Dennis* that it had any reasonable basis for seeking to examine this material. While *Dennis* liberalized the standards for disclosure of grand jury testimony at trial, it did not obviate the need for making a timely request to inspect. The defendants in *Dennis* moved at the trial for production of the grand jury transcript or, alternatively, for its *in camera* inspection by the trial judge followed by production of any portions as to which he found inconsistencies between the witness' trial and grand jury testimony. 384 U.S. at 868. Petitioner gives no valid reason why it did not follow the same course in this case;[9] had it done so, the trial court could have exercised its discretion to determine whether petitioner had shown a particularized need for the transcript.[10]

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[9] *Dennis* itself recognized that following *Procter & Gamble* and *Pittsburgh* many defense counsel made a practice of demanding grand jury transcripts or *in camera* inspection, 384 U.S. at 874, n. 21. There is no reason to assume that the trial judge here would not have conducted an *in camera* inspection for inconsistencies upon timely motion. In *Pittsburgh*, this Court rejected a claim that the trial court erred because it did not conduct an *in camera* inspection (in the absence of other showing of particularized need) "because petitioners made no such request of the trial judge." 360 U.S. at 401.

[10] Thus, inapplicable here are cases like *O'Connor* v. *Ohio*, 385 U.S. 92, and *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, which overlook an appellant's failure to assert a claim below because of an intervening change in decisional law.

Nor do recent lower court decisions applying *Dennis* aid petitioner. See *United States* v. *Youngblood*, 379 F. 2d 365

3. The trial judge's lengthy charge to the jury (Tr. 7059–7201) discussed separately the Sherman Act (Tr. 7092–7116) and the Robinson-Patman Act (Tr. 7116–7147), and then specifically charged on each count individually (Tr. 7149–7196). Under the court's instructions on the Robinson-Patman Act counts, the jury was to decide whether National had sold below cost. Whether it found sales below direct cost, or above direct cost but below fully distributed cost, it was to assess the relevant business evidence to determine whether the sale prices were unreasonably low (Tr. 7141–7144). It was told that it could not find prices below cost to be unreasonably low if they were in furtherance of a legitimate commercial objective, such as to meet the lawful, equally low price of a competitor (Tr. 7125–7140). The jury was repeatedly instructed that it could not convict unless it also found a specific intent to destroy competition (Tr. 7122–7124, 7136, 7140, 7141, 7146).

(a) There is no basis for petitioner's contention (Pet. 24–26) that the instructions permitted conviction on the Robinson-Patman Act counts upon a finding of presumed intent inferred from selling below cost rather than a specific purpose to destroy competition. The trial court carefully and repeatedly pointed out that Congress required proof of a predatory intent and that sales "which are made without any specific intent to destroy competition would not fall within

(C.A. 2); *Cargill* v. *United States*, 381 F. 2d 849 (C.A. 10), certiorari denied, January 15, 1968, No. 794, this Term; *Worthy* v. *United States*, 383 F. 2d 524 (C.A.D.C.). Each of these cases involved a timely motion during trial (and before *Dennis*) to inspect grand jury testimony of government witnesses.

the Act" (Tr. 7122–7124). Petitioner points to no language in the Robinson-Patman instructions that permitted the jury to convict on presumed intent. Petitioner refers (Pet. 25) only to a portion of the charge instructing the jury how to determine whether sales prices are unreasonably low. The court emphasized in that instruction that the standard of reasonableness is objective and external; as an example of external standards of reasonable behavior, it gave Mr. Justice Holmes' familiar illustration of the workman who throws a beam from a scaffold in circumstances which persons of ordinary prudence would recognize as dangerous to life and limb (Tr. 7141–7144). The context clearly shows that the judge was not speaking of intent and the jury was plainly not misled.[11]

(b) Petitioner also urges (Pet. 26) this Court to review the trial judge's instructions on good faith meeting of competition. It contends that the trial court mistakenly treated this as a defense. But the jury was instructed that the government had to prove beyond a reasonable doubt the statutory elements of (1) sales "at unreasonably low prices" (2) "for the purpose of destroying competition or eliminating a competitor," and that if "meet[ing] a lawful, equally low price of a competitor * * * is factually found to be the

[11] Petitioner attempts to support its argument by appending as a footnote to its printed version of the instructions a short extract from the Sherman Act portion of the charge dealing with general intent under Section 1 of that Act (Pet. 25, A–296, n.). But the jury was informed of the different standards under the Sherman and Robinson-Patman Acts, for the court charged separately on the issue of intent under the two statutes (Tr. 7063; 7092–71776 (Sherman Act); 7116–7147 (Robinson-Patman)).

purpose of particular sales below cost, then such an instance would neither be unreasonably low, within the meaning of the statute, nor would such sales be made with the predatory intent required by law" (Pet. A–288). Compare 372 U.S. at 37.

This Court had made clear (372 U.S. at 36–37) that the burden of coming forward with evidence on meeting competition lies with the defendant. The government is not required to negative a defendant's possible justifications, for the latter is obviously best situated to develop exculpatory facts. See *Ben Hur Coal Company* v. *Wells,* 242 F. 2d 481 (C.A. 10), certiorari denied, 354 U.S. 910. Under the trial court's instructions, however, the government had the ultimate burden of proving each element of the offense, and if the jury had any question that the defendant's sales below cost were made to meet competition, it would have acquitted.

Petitioner argues (Pet. 28) that its burden on meeting competition was made more difficult because the trial court's instructions contemplated that competing prices be lawful and actually in existence. But this Court had expressly stated that sales below cost are not illegal when made in furtherance of "the need to meet a lawful, equally low price of a competitor." 372 U.S., pp. 36–37. See, also, *Federal Trade Commission* v. *Staley Co.,* 324 U.S. 746, 753–754; *Standard Oil Co.* v. *Federal Trade Commission,* 340 U.S. 231, 247, n. 14. Petitioner does not contend that there was any real issue at trial as to whether the competitors' lower

prices in response to which National allegedly cut its prices actually existed.[12]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[12] Petitioner also complains that it was prejudiced with respect to "meeting competition" by two comments in the instructions. The court warned the jury that a witness' conclusory statement that prices were cut to meet competition did not of itself resolve the issue (Pet. A–288). This was not an inappropriate warning since it had to be made clear to the jury that *it* was to decide this issue. In the same portion of the charge the court also referred to the familiar differentials in gasoline prices encountered by motorists among various service stations (Pet. A–292–293). This also was not inappropriate since price differentials between paper cartons and jugs were characteristic of the pricing structure which the jury would have to consider in determining whether reductions were aimed at meeting or destroying competition. These objections relate simply to minor details of a long and difficult instruction. The comments were illustrative only, and in context were not prejudicial.

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